

No. 21697

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT

v.

STEWART L. UDALL, SECRETARY OF
THE INTERIOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF AND APPENDIX FOR THE APPELLEE

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FILED

JUN 12 1967

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OPINION BELOW

The opinion of the district court is contained in
the record at pages 29-49.

JURISDICTION

Jurisdiction of the district court is alleged to
be based upon the Administrative Procedure Act, the Declaratory
Judgment Act, the existence of a federal question and the in-
herent power of the court to grant injunctive relief. Appellee
does not believe that jurisdiction of the district court over

the Secretary of the Interior can be based upon any of the above grounds. Jurisdiction is also stated to be based on the Act of October 5, 1962, 76 Stat. 744, 28 U.S.C. secs. 1361, 1391, which authorizes actions in the nature of mandamus to compel an officer or employee of the United States to perform a ministerial duty. Appellee agrees that 28 U.S.C. sec. 1361 gives the district court a limited jurisdiction over the Secretary of the Interior and that venue is based on 28 U.S.C. sec. 1391(e). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

Administrative proceedings culminating in a decision of the Secretary of the Interior held that the Act of 1955, providing for federal management of the surface of mining claims, applied to appellant's claims. The questions presented are:

1. Whether there are any procedural errors in the administrative proceedings which would require reversal and new proceedings.
2. Whether the district court erred in finding that appellant's charges of bias on the part of the hearing examiner were groundless.

3. Whether the district court erred in finding that the decision of the Secretary of the Interior was supported by substantial evidence.

STATUTE AND REGULATION INVOLVED

Section 4 of the Act of July 23, 1955, 69 Stat. 367, 368-369, 30 U.S.C. secs. 612(a), 612(b), provides in pertinent part:

- (a) Prospecting, mining or processing operations.

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

- (b) Reservations in the United States to use of the surface and surface resources.

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use

so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: Provided further, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: Provided further, That nothing in sections 601, 603, and 611-615 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

* * * *

Section 5 of the Act of July 23, 1955, 69 Stat. 367, 369-371, 30 U.S.C. secs. 613(a), 613(c), 613(e), provides in pertinent part:

(a) Notice to mining claimants; request; publication; service.

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession or engaged in such working on the date of such examination, setting forth the name and address of each such person, unless affiant shall have been unable through reasonable inquiry to obtain information as to the name and address of any such person, in which event the affidavit shall set forth fully the nature and results of such inquiry.

The filing of such request for publication shall also be accompanied by the certificate of a title or abstract company, or of a title abstractor, or of an attorney, based upon such company's abstractor's, or attorney's examination of those instruments which are shown by the tract indexes in the county office of record as affecting the lands described in said request, setting forth the name of any person disclosed by said instruments to have an interest in said lands under any unpatented mining claim heretofore located, together with the address of such person if such address is disclosed by such instruments of record. "Tract indexes" as used herein shall mean those indexes, if any, as to surveyed lands identifying instruments as affecting a particular legal subdivision of the public land surveys, and as to unsurveyed lands identifying instruments as affecting a particular probable legal subdivision according to a projected extension of the public land surveys.

Thereupon the Secretary of the Interior, at the expense of the requesting department or agency, shall cause notice to mining claimants to be published in a newspaper having general circulation in the county in which the lands involved are situate.

Such notice shall describe the lands covered by such request, as provided heretofore, and shall notify whomever it may concern that if any person claiming or asserting under, or by virtue of, any unpatented mining claim heretofore located, rights as to such lands or any part thereof, shall fail to file in the office where such request for publication was filed (which office shall be specified in such notice) and within one hundred and fifty days from the date of the first publication of such notice (which date shall be specified in such notice), a verified statement which shall set forth, as to such unpatented mining claim--

(1) the date of location;

(2) the book and page of recordation of the notice or certificate of location;

(3) the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument;

(4) whether such claimant is a locator or purchaser under such location; and

(5) the name and address of such claimant and names and addresses so far as known to the claimant of any other person or persons claiming any interest or interests in or under such unpatented mining claim;

such failure shall be conclusively deemed (i) to constitute a waiver and relinquishment by such mining claimant of any right, title, or interest under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (ii) to constitute a consent by such mining claimant that such mining claim, prior to issuance of patent therefor, shall be subject to the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, and (iii) to preclude thereafter, prior to

issuance of patent, any assertion by such mining claimant of any right or title to or interest in or under such mining claim contrary to or in conflict with the limitations or restrictions specified in section 612 of this title as to hereafter located unpatented mining claims.

If such notice is published in a daily paper, it shall be published in the Wednesday issue for nine consecutive weeks, or, if in a weekly paper, in nine consecutive issues, or if in a semiweekly or triweekly paper, in the issue of the same day of each week for nine consecutive weeks.

Within fifteen days after the date of first publication of such notice, the department or agency requesting such publication (1) shall cause a copy of such notice to be personally delivered to or to be mailed by registered mail or by certified mail addressed to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, and to each person who may have filed, as to any lands described in said notice, a request for notices, as provided in subsection (d) of this section, and shall cause a copy of such notice to be mailed by registered mail or by certified mail to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located, such notice to be directed to such person's address as set forth in such certificate; and (2) shall file in the office where said request for publication was filed an affidavit showing that copies have been so delivered or mailed.

(c) Hearings.

If any verified statement shall be filed by a mining claimant as provided in subsection (a) of this section, then the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 612 of this title as to hereafter located unpatented mining claims, which place of hearing shall be in the county where the lands in question or parts thereof are located, unless the mining claimant agrees otherwise. Where verified statements are filed asserting rights to an aggregate of more than twenty mining claims, any single hearing shall be limited to a maximum of twenty mining claims unless the parties affected shall otherwise stipulate and as many separate hearings 1/ shall be set as shall be necessary to comply with this provision. The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States. If, pursuant to such a hearing the final decision rendered in the matter shall affirm the validity and effectiveness of any mining claimant's so asserted right or interest under the mining claim, then no subsequent proceedings under this section shall have any force or effect

1/ So in original. Probably should be "hearings".

upon the so-affirmed right or interest of such mining claimant under such mining claim. If at any time prior to a hearing the department or agency requesting publication of notice and any person filing a verified statement pursuant to such notice shall so stipulate, then to the extent so stipulated, but only to such extent, no hearing shall be held with respect to rights asserted under that verified statement, and to the extent defined by the stipulation the rights asserted under that verified statement shall be deemed to be unaffected by that particular published notice.

* * * * *

(e) Failure to deliver or mail copy of notice.

If any department or agency requesting publication shall fail to comply with the requirements of subsection (a) of this section as to the personal delivery or mailing of a copy of notice to any person, the publication of such notice shall be deemed wholly ineffectual as to that person or as to the rights asserted by that person and the failure of that person to file a verified statement, as provided in such notice, shall in no manner affect, diminish, prejudice or bar any rights of that person.

43 C.F.R. sec. 1852.3-2 provides:

The examiner shall fix a place and date for the hearing and notify all parties and the Bureau at least 30 days in advance of the date set, unless the parties and the Bureau request or consent to an earlier date. The notice shall

include (a) the time, place, and nature of the hearing, (b) the legal authority and jurisdiction under which the hearing is to be held, and (c) the matters of fact and law asserted.

STATEMENT

On December 6, 1965, appellant instituted this action

^{1/} seeking to overturn a decision of the Secretary of the Interior.

The decision of the Secretary of the Interior was issued after detailed review of the facts and testimony in the record of this case and after consideration of the same arguments which are being presented to this Court. The Secretary, in affirming the decision of the Director of the Bureau of Land Management, which had affirmed the decision of the Hearing Examiner, held that the appellant's two unpatented mining claims were subject to the restrictions and reservations in Section 4 of the Surface Resources Act of July 23, 1955, 69 Stat. 367, 30 U.S.C. sec. 613. The basic issue to be determined in the agency proceedings was whether or not a valuable deposit of minerals had been discovered on either of the appellant's

^{1/} We use the term "Secretary," although the decision was by a subordinate acting under delegated authority.

two unpatented mining claims prior to July 23, 1955, the effective date of the Surface Resources Act. If the requirements of a discovery under the mining laws had been met prior to that date, then the provisions of the Surface Resources Act would not apply. The Act, in general, provided that any mining claims located after July 23, 1955, would be subject to the right of the United States to manage and dispose of surface resources other than mineral deposits. The purpose of this Act was to limit the use or misuse of surface resources by mining claimants prior to the issuance of a patent. In this case, it has been stipulated that the value of the timber on these two unpatented mining claims was \$91,038.61 (R. 32). The validity of the appellant's two mining claims was not in issue in this proceeding (R. 48). Nor is the right to timber, as such, since the mining claimant, prior to patent, can use timber only to promote his mining operations (see United States v. Etcheverry, 230 F.2d 193 (C.A. 10, 1956), and cases there cited), and the Surface Resources Act recognizes this right, subject to management programs.

The Surface Resources Act, supra, provides a detailed procedure for determining whether the United States is to have the right to manage surface resources of unpatented mining claims which were located prior to the passage of that Act. In accord with the provisions of that Act, a request was made, by the Chief of the Forest Service acting on behalf of the Secretary of Agriculture, that a determination be made as to who had the right to manage the surface resources of the appellant's two mining claims (R. 233). As required by the statute, it was requested that public notice also be given to mining claimants. Publication, as required, was made (R. 241-242). Notice was also mailed to mining claimants who had been in various ways identified (R. 240). Also filed with the request for determination were the required certificate of examination (R. 235) and a certificate of nonexistence of tract indexes (R. 238).

Appellant, on July 26, 1961, in response to these notices, filed a verified statement. Upon the filing of this verified statement, it became the duty of the Secretary, in compliance with 30 U.S.C. sec. 613(c), to fix the time and

place for a hearing to determine the validity of the mining claims to which the claimant asserted rights contrary to the limitations and restrictions of 30 U.S.C. sec. 612. The Act provides in part, 30 U.S.C. sec. 613(c), that:

The procedures with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.
[Emphasis supplied.]

As required under the regulations of the Department, 43 C.F.R. sec. 1852.3-2 (supra, pp. 10-11), notice was given to the appellant, by the hearing examiner, of the time and place and nature of the hearing, the legal authority and jurisdiction under which the hearing was to be held and the matters of fact and law asserted.

A hearing before an examiner was held at Portland, Oregon, on June 11, 1962. At the outset of the hearing the mining claimant filed a motion to change the hearing examiner and filed an affidavit in support of that motion charging bias and prejudice. The motion was denied by the examiner as not having been timely filed as required by 5 U.S.C. sec. 1006(a).

(R. 37). The examiner stated "* * * I think, if you had filed it ten days ago I could have had a different Hearing Examiner at the hearing." (R. 186.)

The sole issue at the hearing was whether or not a valuable deposit of minerals had been discovered on either of the two claims prior to July 23, 1955. The hearing examiner did not attempt to determine whether or not a discovery had been made since that date, although much of the testimony produced at the hearing pertained to evidence of mineralization uncovered since that date (R. 17).

The district court, in its opinion, has carefully stated the proceedings which this case has gone through up to this present appeal. Rather than rephrasing this material, we adopt its recital of the facts, omitting only the irrelevant materials (R. 31-32):

* * * From the evidence adduced at the hearing, Hearing Examiner Holt concluded that the most favorable finding which could be made for the mining claimant was that there was sufficient evidence of mineralization to induce a prudent man to retain the claims until a road had been constructed and until more extensive exploration had been completed, but that there was

not sufficient evidence of mineralization, as of July 23, 1955, to induce a prudent man to expend labor and means on either the Paymaster or Edith Lode claims with a reasonable expectation of developing a valuable mine. As a result, these two mining claims were held not to have been validated prior to passage of the Surface Resources Act, and were found to be subject to the limitations and restrictions of that Act.

This determination did not directly affect the mining claims themselves. The mining claimant still had the right to use the claims for mining purposes, and for any other purpose incidental to mining. The adverse determination to mining claimant Converse only precluded him from using the surface resources (including the timber of the claims, which the parties stipulated to have a value of \$91,038.61) in a manner not incidental to mining, and made the claims subject to the right of the government to manage the surface resources, until a patent was obtained.

Following administrative regulations, claimant Converse appealed the decision of Hearing Examiner Holt to the Director of the Bureau of Land Management. He contended in substance that: a fair hearing was impossible because the examiner was prejudiced and had prejudged the case; he was entitled to a jury trial, and the administrative hearing was a deprivation of property without due process of law; the government had failed to establish a prima facie case, and he had affirmatively showed that a discovery had been made on each of the claims; the hearing examiner erred in holding that assays or ore

samples taken by the mining claimant after July 23, 1955, were inadmissible, while those taken by the contestant after the same date were admissible; and, the government's witnesses did not fairly sample portions of the claims alleged to have been opened prior to 1955.

On October 8, 1963, the Assistant Director, Bureau of Land Management, affirmed the decision of Hearing Examiner Holt. Claimant Converse then appealed to the Secretary of the Interior, reiterating essentially the same arguments that were contained in his appeal to the Director of the Bureau of Land Management, and adding the contentions that the Director erred in holding that "exploration and development," as used in mining laws are not synonymous, and that the Director either ignored or refused to accept the facts found by the hearing examiner. On March 26, 1965, the decision of the Assistant Director was affirmed by Ernest F. Hom, Assistant Solicitor of the Interior, pursuant to authority delegated by the Secretary of the Interior.

The mining claimant thereafter instituted this action in the district court, seeking the dismissal of the proceeding or that the matter be remanded to the Secretary for a new trial (R. 3-4). Both parties to this proceeding filed briefs and moved for summary judgment based upon the record in the administrative proceedings.

The district court, in its opinion, fully considered the numerous contentions of the appellant which are raised on this appeal (R. 37-46). The charges of bias, procedural defects, lack of due process and refusal to change hearing examiners are discussed and answered by the court in considerable detail. The district court concluded (R. 45-46)

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The district court went on to hold (R. 48):

Of course, this affirmance in no way affects the validity of the mining claims as such. Plaintiffs retain the right to work their claims for mining purposes, and for all purposes incidental to mining. This affirmance only precludes the plaintiffs from using the surface resources of the claims in a manner which is not incidental to mining, until a patent is obtained. In other words, the claims remain subject to the right of the government to manage the surface resources, when not interfering [sic] with the mining.

The Secretary had previously said almost the same thing when he held (R. 28):

If the appellant is convinced that he has satisfied the requirements of a discovery, he may, of course, apply for a patent to the claims. If, on the other hand, he does not wish to risk the possibility of an adverse ruling on that question, this decision does not bar further effort on his part to explore and develop the mineral deposits which may be found within the limits of the claims and then, upon making a discovery, apply for a patent.

From the court's granting of the Secretary's motion for summary judgment, dated September 14, 1966 (R. 50), the appellant filed a motion for a new trial (R. 51), which was denied by order dated November 30, 1966 (R. 89, 91-92). From this final order, the appellant filed his appeal dated January 27, 1967 (R. 93).

SUMMARY OF ARGUMENT

I

The proceedings instituted to determine who shall manage the surface resources of the public domain upon which appellant has unpatented mining claims fully complied with the provisions of the Surface Resources Act. All procedural requirements have been satisfied. In any event, even if appellant's arguments had merit, no substantive rights of appellant are affected and nothing would be gained by remanding this for a rehearing.

Appellant is in no position to challenge the service of notice of these proceedings, since he responded to the notice and appeared at the agency proceedings. In fact, personal service was made.

The appellee fully complied with the outlined procedure for instituting the agency proceedings.

There is nothing improper in the hearing examiner's refusing to accept a detailed offer of proof of obviously irrelevant testimony.

II

The charges that the hearing examiner was biased are groundless. The procedure of notifying appellant of the matters of fact and law asserted complied with the departmental regulations. It is nonsense to suggest that, by notifying the appellant of the proceeding instituted by the Fore Service, the hearing examiner has become a prosecutor. The record shows that the district court properly found that the denial of appellant's motion for a change of hearing examiner was proper as not being timely made.

III

The decision of the Secretary is supported by substantial evidence. It is not the function of this Court to weigh the evidence. Upon a review of the entire administrative proceeding, if there is found substantial evidence to support the Secretary's decision, it must be affirmed.

The district court, after a thorough review of the record, has concluded that the decision of the Secretary is based on substantial evidence. The disposition of this case by summary judgment was proper and correct in all respects.

ARGUMENT

I

THE PROCEDURE FOLLOWED IN DETERMINING
WHO IS ENTITLED TO MANAGE THE
SURFACE RESOURCES OF THE APPELLANT'S
UNPATENTED MINING CLAIMS FULLY COMPLIED
WITH THE PROVISIONS OF 30 U.S.C. SEC. 613

Prior to showing the lack of merit in appellant's objections to the administrative procedure, we note that, even if valid, none of them would affect any substantial right of appellant, nor would they alter the evidence or the basis of the departmental decisions. They cannot, we submit, justify reversal and a complete, new administrative proceeding.

The Surface Resources Act, in parts (a) to (e), 30 U.S.C. sec. 613, contains detailed provisions for the institution of proceedings to determine whether a valid discovery had been made on mining claims which had been located prior to passage of that Act. As set forth in the Statement of this brief, each step required by the subject Act was fully complied with. The district court, in its opinion (R. 42-44) fully considered and answered appellant's argument that the procedural requirement of the Surface Resources Act had not been fully met. The delegated representative of the Secretary of Agriculture instituted this proceeding (R. 233); the area of land involved was described by a public land survey description (R. 235); there was a request made for publication (R. 233); there was publication (R. 241-242); there was filed the required affidavit of examination (R. 235-237); and there was also filed a certificate of nonexistence of tract indexes (R. 238). The fact of the appellant being completely informed is verified by the fact of his having answered the notice of publication by the filing of his verified statements (R. 44). As the district court held "They are in no position to questi-

the service" (R. 44). The argument made by appellant (Br. 38-40), that there must be personal service if the proceedings are to be regular and have any effect, is simply a play on words, since there was notice given and received, followed by appearance.

The record shows that the district court did find that "A copy of the publication was not served on the mining claimant as demanded by the statute" (R. 43-44). The court went on to find that the appellant was completely informed of the notice of publication and answered it by filing his verified statement. The court did not need to go this far to find that appellant had been advised of the publication of the notice. The record that is before this Court, evidently overlooked by the district court in the maze of arguments presented by the appellant, shows that, in fact, service of the published notice was made. The affidavit of service is in the record at page 240, and the list of addresses mailed to (R. 236) shows that notice was, in fact, mailed to the appellant.

It is argued by appellant, that the Government did not follow the rules of practice of the Department in respect

to the institution of contests or protests (Br. 34). Appellant argues that a complaint must still be filed in order to institute a contest. The district court held (R. 44): "The use of a complaint is averted by the publication requirements of the statute."

It is clear from a reading of the Act that proceedings to ascertain who is to manage the surface resources of mining claims are to be instituted in accord with the detailed procedure set forth in the Act. The Act provides, after stating how the proceedings are to be instituted, that "The procedure with respect to notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States." 30 U.S.C. sec. 618(c).

This provision of the Act relates not to institution of proceedings, as appellant would have it, but rather to conduct of proceedings instituted in the manner Congress provided in the earlier sections. Appellant's argument produced the absurd result that, despite all those provisions, a formal

complaint must also be filed and served. Neither the language of the statute nor good sense can justify such a result.

Appellant also argues (Br. 40) that there has been failure to comply with the requirement that a certificate of title accompany the request for publication. The district court held that there could not be compliance, due to the fact there were no tract indexes of the lands in question. The court stated "Obviously, compliance was impossible and the point does not go to the merits" (R. 43). The reason for this requirement was to ascertain the parties claiming interests in the mining claims, so that they could be notified of the pending proceedings. Notice here has been given and received, once the court's finding that the supposed defect did not go to the merits. The certificate of nonexistence of tract indexes (R. 238) is said to be contradicted by the affidavit of service (R. 240). This affidavit is not at all inconsistent with the certificate of nonexistence of tract indexes. The affidavit of service states that notice was mailed to persons in three different categories. Appellant falls in category No. 1. In this instance, apparently no persons would be covered by category No. 3. Obviously, the paragraph (which has no

application here), which is said to be inconsistent, is but a part of a form letter. The only possible objection to paragraph No. 3 would be that it was not stricken from the form letter. This is but a nit pick of no consequence. It should also be noted that appellant has not challenged the truth of the Government's certificate of nonexistence of tract indexes.

The appellant also argues (Br. 54) that the hearing examiner erred in refusing to admit into evidence certain testimony or to permit offers of proof to be made of certain testimony. The district court considered the appellant's arguments and stated (R. 45):

The issue is not whether there was a discovery at the date of the hearing, but whether a discovery was made upon the claims in question prior to the passage of the Surface Resources Act. To demonstrate a discovery prior to July 23, 1955, required samples of mineral from portions of the claims exposed prior to that date. Plaintiffs' evidence of mineral deposits exposed at a later date was not material. The government's samples were taken from areas which were exposed on or before the date of the Act.

The appellant's complaint about restrictions upon the presentation of his case represents simply his refusal to confine his testimony to the relevant issue, which was the existence of a valid discovery prior to July 23, 1955. Appellant, in his brief

op. 56-57), quotes the transcript of the proceedings before the hearing examiner as an example of the hearing examiner denying an offer of proof. Very clearly, that quoted extract shows one of the reasons for the rejection of the offer of proof to be that the testimony offered related to a period subsequent to July 23, 1955. There can be no possible prejudice in the refusal of a hearing examiner to permit the introduction into the record of obviously irrelevant testimony which has no bearing on the question to be decided. Certainly, it is not required to clutter the record with offers of proof showing the details of irrelevant matters.

II

THERE IS NOTHING IN THE RECORD WHICH SUPPORTS THE APPELLANT'S CHARGE THAT THE HEARING EXAMINER WAS BIASED

Appellant argues that, because the hearing examiner signed the notice of hearing, he is both prosecutor and judge and thereby violates the principle that one who is engaged in prosecuting function shall not judge. The Surface Resources Act provides in pertinent part (30 U.S.C. sec. 613(c)):

* * * notice of such a hearing and the conduct thereof, and in respect to appeals shall follow the then established general procedures and rules of practice of the Department of the Interior in respect to contests or protests affecting public lands of the United States.

The Department's regulations dealing with this subject are contained in 43 C.F.R. part 1850. Particular attention is directed to sec. 1852.3-2, supra. It is expressly provided by this section that the examiner will give a notice which shall contain among other things, "the matters of fact and law asserted." This, the examiner has done, and for this act of informing the appellant of what the issues to be heard at a hearing are, he is charged as being engaged in a prosecutor function. This charge is patently ridiculous. It produces an absurdity. Appellant would require (again a pure formality) having some other government employee give notice of the hearing examiner's schedule of cases.

The district court, in considering this argument, had this to say (R. 40-41):

Plaintiffs' argument that Holt, by signing the notice of hearing, was combining the functions of a prosecutor and a judge, thus violating both the Administrative Procedure Act and due process, is completely specious. These notices

of hearing did nothing more than notify the plaintiffs of the issues to be dealt with at the subsequent proceedings. The fact that Holt signed such documents, and later presided at the hearing, is no more a violation of due process than the pre-trial orders federal judges sign every day. Moreover, plaintiffs' contention is based on the premise that the hearing examiner brought the charge against these claims, but the simple fact is that he did not. The Forest Service initiated the charges, and this is made clear by the notice of hearing. Thus, Holt merely informed the plaintiff of the charges which were brought by the agency. Even if he had instituted the proceedings, this would not have violated the Administrative Procedure Act:

The appellant has also charged (Br. 62) the examiner with bias as a matter of fact. The district court fully considered this charge in its opinion (R. 37-42). It stated R. 39):

* * * Plaintiffs, in my opinion, have fallen far short of meeting this test and, conversely, the record indicates that their hearings were conducted fairly and impartially by Hearing Examiner Holt.

* * * * *

The allegations in the affidavits that the examiner had never decided a case of this type in favor of mining claimants, are belied by the record which contains copies of findings prepared by the examiner in which he decided wholly or partially in favor of mining claimants in cases involving Oregon land. But, even if we were to assume that

Holt was predisposed in favor of the government in such actions, the fact remains that the bias has to be personal in order for them to prevail.

[Footnote quoting Marquette Cement Mfg. Co. v. Federal Trade Commission, 147 F.2d 589, 592 (C.A. 7, 1945), omitted.]

An examination of the record shows, as the district court found, that the hearing examiner "was most solicitous of their [appellant's] feelings at the hearing * * *. In short, he [the examiner], throughout both hearings, went out of his way to accomodate [sic] plaintiffs" (R. 40).

Another example of the objectivity and solicitous attitude of the examiner is his statement that "* * * I think if you had filed it ten days ago I could have had a different Hearing Examiner at the hearing" (R. 186). This statement was made by the examiner after denying the appellant's motion for a change of examiners. The court below has found that there was a substantial basis in the administrative record for denying the motion as not being timely and sufficient (R. 41). The court went on to state (R. 42):

The record anchors a finding that plaintiff knew for some time that Holt was to hear the case. Furthermore, to permit a mining claimant to delay hearings by waiting until

the commencement of a hearing to ask for a change of hearing examiner, where as here it was necessary for the hearing examiner to travel several hundred miles to be present at a hearing, would frustrate the administrative process.

III

THE SECRETARY'S DECISION IS BASED UPON SUBSTANTIAL EVIDENCE

This Court, in Henrikson v. Udall, 350 F.2d 949, 950
965) held:

It is the function of neither this Court nor of the District Court, in a proceeding such as this, to weigh the evidence adduced in the administrative proceeding. Rather, if upon review of the entire record of that proceeding there is found substantial evidence to support the Secretary's decision, that decision must be affirmed.

e also Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959).

The district court stated (R. 45-46):

Upon a review of the entire records of the two proceedings in question here, it is my finding that there is substantial evidence to support the Secretary's decision.

The court went on to hold (R. 46-47):

When the government contests a mining claim, it bears the burden of going forward with sufficient evidence to establish a prima facie case. The burden then shifts to the claimant to show, by a preponderance of the evidence, that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). 68 I.D. 235, 238 (1961).

From an examination of the entire record, I find that the government did sustain its burden of proof. Manifestly, the testimony of the government witnesses was sufficient to create a prima facie case in favor of the government's position. Their examination of the claims and their analysis of the mineral samples taken therefrom failed to disclose a discovery of a valuable mineral deposit on any one or more of the claims.

It is now settled beyond question that the issue of whether there has been a valid discovery of minerals is a question of fact. Furthermore, it is indicated that the decision of the Secretary on that issue is conclusive, in the absence of fraud or imposition. Cameron v. United States, 252 U.S. 450 (1920). Whether the decisions of the Secretary of the Interior in this case are conclusive, I need not decide. Certainly, there is not evidence of fraudulent, capricious or arbitrary action on the part of the Interior Department, unless it could be said that the action of the hearing examiner in failing to step aside could be viewed in that light. Already, I have decided adversely to the plaintiffs on this issue. Again, I repeat that the finding that a discovery of a valuable mineral deposit was not made on any one or more of the claims prior to July 23, 1955, is supported by substantial evidence and must not be disturbed.

To be kept in mind is the fact that most of the higher quality samples of minerals, on which plaintiffs rely, were taken from cuts exposed after the effective date of the Act.

Whether valid discovery has been made is a question of fact, the decision of which by the Secretary of the Interior, based on substantial evidence, is conclusive, in the absence of fraud or imposition, and none is claimed in this case.

Cameron v. United States, 252 U.S. 450, 459-461 (1920); Boesche v. Udall, 373 U.S. 472, 476-477 (1963); Best v. Humboldt Mining Co., 371 U.S. 334, 335-336 (1963). Even though a court in a trial de novo might have arrived at a different result, it may not substitute its judgment for that of the administrative agency expert in its field.

The decision of the Secretary of the Interior explains in considerable detail why the examiner found that no discovery had been made as of July 23, 1955, on appellant's mining claims.

In order to reduce the size of this brief, we have not duplicated the Secretary's comprehensive review of the facts and evidence that is the basis of his decision. This material is contained in the Secretary's decision (R. 17-28)

and treats in detail the conflicts in the testimony. The district judge stated (R. 47-48): "I find myself in full agreement with the summarization by the Secretary in his decision." We submit that the evidence upon which the Secretary's decision was based, as shown by his decision, is substantial and fully supports his decision.

The only function of the court below with regard to the facts of this case was to determine whether the administrative findings of fact are supported by substantial evidence in the administrative record as a whole. The judicial determination of whether findings of fact are supported by substantial evidence presents only an issue of law. Since the Secretary's decision, as shown by his comprehensive treatment of the facts, is based on substantial evidence, and cross-motions for summary judgment were filed, the court's disposition of this by summary judgment was proper and correct in all respects.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JUNE 1967

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE R. HYDE
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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

FORD M. CONVERSE,)	
Plaintiff,)	
v.)	CIVIL NO. 65-581
STEWART L. UDALL, Secretary of the Interior,)	
Defendant.)	FILED NOV 30 1966
INDEPENDENT QUICK SILVER CO.,)	
an Oregon corporation,)	
Plaintiff,)	
v.)	CIVIL NO. 65-590
STEWART L. UDALL, Secretary of the Interior,)	
Defendant.)	ORDER

This cause is before the Court on plaintiffs' motion for a new trial on the Court's previous decision of September 14, 1966.

Independent Quick Silver again challenges the Government's method of sampling each of the twenty-two claims involved, it being claimed that there was a failure to prove a prima facie case by substantial evidence. It is urged that

the six samples of ore taken by the contestant all came from one of the twenty-two claims in controversy, viz: the Lost Mine Claim.

The evidence is contrary to the plaintiff's contentions. The Forest Service Examiners spent three days examining the claim and, in fact, examined all of the places shown to them by the plaintiff's representatives and took samples of all of the cuts that were open. Plaintiff is not in a position to now urge that all of the samples came from one claim when it was its own representatives who directed the Forest Service Examiners to where to obtain the samples. If, as here, a close scrutiny of the surface indicated that no cuts had been opened other than examined, then it seems rather clear that a mineral discovery had not been made.

Plaintiff again urges that the Assistant Solicitor of the Interior committed error in holding that certain testimony and reports were hearsay. The Solicitor stated, in passing, that much of the evidence was general in nature and that much of it probably, especially specific information, was hearsay where there was no opportunity for cross-examination.

Although the Solicitor might have disregarded some of the Hogg statements and the assays compiled by the geologist Westman, the fact remains that the Assistant Solicitor accepted all of this testimony and these records, but found that the evidence lacked specificity and showed only that further exploration was recommended. Plaintiff's real complaint is that the Solicitor did not give more weight to this evidence, rather than excluding it under the hearsay rule.

It is next urged that if the decision of September 14th is allowed to stand that the Court would be approving an administrative decision that the discovery of a body of ore containing 18,600 tons, with an average of 5.2 pounds of mercury per ton, would not be a discovery within the meaning of the mining law. There is nothing in the decision of the Assistant Solicitor, nor, for that matter, in any part of the record, which supports this argument. The Solicitor merely held that the plaintiff did not sufficiently prove that such a body of ore existed. In other words, the Solicitor resolved the issue of fact against the plaintiff.

I find nothing in the arguments of Quicksilver which would cause me to, in any way, modify my original opinion.

In the Converse case, it is argued that the original decision departs from the well settled rule of discovery and makes discovery depend on the name applied to the additional work which a reasonably prudent person would be justified in expending in both money and effort. It is argued that the Assistant Solicitor has altered the long-standing policy of the Department and now recognizes a distinction between the terms "discovery", "development" and "exploration". The record leaves little doubt that the Department has long recognized a sharp distinction between "exploration" and "development" in connection with whether a "discovery" has been made. For example, if one has found only enough mineral to justify further "exploration", as yet he has not made a "discovery", but if he has found enough mineral to justify a "development", then a "discovery" has been made. The opinion of the Assistant Solicitor is given complete support by United States v. Altman, et al, 68 I.D. 235, 237-8 (1961), from which I quote:

"There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is

often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals are found of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made."

Additional support is added to the opinion of the Assistant Solicitor by United States v. Edgecumbe Exploration Co., Inc., A-29908 (May 25, 1964).

Plaintiff fails to recognize that once the Government has established a prima facie case, the burden shifts to the claimant to show by a preponderance of the evidence that his claim is valid. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The motion for a new trial in each case is denied.

IT IS SO ORDERED.

DATED this 30th day of November, 1966.

s/ John F. Kilkenny

District Judge